

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35160

**OREGON INTERNATIONAL PORT OF COOS BAY
—FEEDER LINE APPLICATION—
COOS BAY LINE
OF THE CENTRAL OREGON & PACIFIC RAILROAD, INC.**

Docket No. AB-515 (Sub-No 2)

**CENTRAL OREGON & PACIFIC RAILROAD, INC.
—ABANDONMENT AND DISCONTINUANCE OF SERVICE—
IN COOS, DOUGLAS, AND LANE COUNTIES, OREGON (COOS BAY RAIL LINE)**

COMMENTS OF THE STATE OF OREGON

I. Introduction

The State of Oregon ("State") respectfully submits these comments, pursuant to 49 CFR § 1151.2(e) and the Surface Transportation Board's procedural schedule issued on August 1, 2008, regarding the application to abandon and discontinue service of the Coos Bay Line ("Line") submitted by RailAmerica and the Central Oregon & Pacific Railroad, Inc. ("CORP"), and the feeder line application submitted by the Oregon International Port of Coos Bay ("Port"), in the above-titled matters.

The background and history of the Line and the events surrounding CORP's embargo of the Line have been described in filings made in Docket 35130 (show cause proceeding), and Docket 35160 (feeder line application) and Docket AB-515 (Sub-No 2) (abandonment and discontinuance of service). The State directs the Board's attention to the Show Cause Reply filed by the State on June 3, 2008 in Docket 35130. A public

hearing in the abandonment and feeder line proceedings was held on August 21, 2008 in Eugene, Oregon.

The Board should deny CORP's application to abandon the Line until such time as CORP has restored the Line to a serviceable condition. The condition used to justify the embargo was caused by CORP's neglect and failure to maintain the Line during its ownership of the Line. CORP's lack of investment in the infrastructure of this Line over the last 14 years violates its obligation as a common carrier. *See State of Oregon's Show Cause Reply*. The railroad cannot be allowed to milk the Line for profits, and bring it to a point of ruin from neglect, and then walk away and expect to be paid a premium price by the shippers and the public in the Port's feeder line application for a Line that is no longer in operable condition.

The Board heard public testimony that if corporations such as RailAmerica and CORP are allowed to abuse critical rail infrastructure to the failing point and simply walk away, there will come a point where damage to that infrastructure will exceed the financial incentive and public resolve to restore it. At that point the infrastructure will be lost and the economic impacts to the affected communities may be permanent and insurmountable.

The Port has the ability and resolve to operate the Line and to restore service to shippers. The Board should grant the Port's feeder line application and establish a reasonable price for sale with a condition that CORP must pay the cost to restore the Line to serviceable condition.

II. Statutory Standards

The statutory standard governing abandonment is whether the present and future public convenience and necessity permit the proposed abandonment. 49 U.S.C. § 10903(a). The Board must balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. *See Colorado v. United States*, 271

U.S. 153 (1926). The Board must determine whether the burden on the railroad from continued operation of the Line is outweighed by the burden on the shippers and public parties from the loss of rail service. *Consolidated Rail Corporation--Abandonment--Between Warsaw and Valparaiso, in Kosciusko, Marshall, Starke, La Porte and Porter Counties, IN*, Docket No. AB-167 (Sub-No. 1125), 1993 ICC LEXIS 303, slip op. at 33-34 (served January 14, 1994) ("*Consolidated Rail*").

Essentially, this involves a question of whether, and to what degree, shippers will be harmed if rail service is terminated. *Id.* For abandonment determinations, the Board considers a number of factors, including operating profit or loss, other costs the carrier may experience (including rehabilitation and economic costs), as well as the effects on shippers and communities. *Id.* No one factor is conclusive. *Id.* In some cases, although the volume of the whole traffic is small, "the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier." *Colorado v. United States*, 271 U.S. at 168-169 (citations omitted). The factors here weigh in favor of denying the abandonment until CORP has restored the Line to a serviceable condition.

On the Port's feeder line application to purchase the Line from CORP under 49 U.S.C. § 10907, the Board may require a rail carrier to sell a rail line to a financially responsible person if the public convenience and necessity require or permit the sale, or the railroad has designated the line on a system diagram map as a candidate for abandonment. Both criteria are met here. In assessing the public convenience and necessity in a feeder line case, the Board looks at factors such as whether the carrier has refused within a reasonable time to make the necessary effort to provide service; whether the transportation is inadequate for the majority of the shippers on the line, and, whether a sale is likely to improve service. Here, the railroad has designated the section of the Coos Bay Line between Cordes and Vaughn for abandonment, so these requirements

are satisfied for that segment. The Line is embargoed, there is no service, and a sale is likely to improve service. As to the Port's offer to purchase the additional 17 mile segment between Vaughn and Danebo, which is not a part of CORP's abandonment application, CORP does not oppose the inclusion of the Danebo to the Vaughn segment in the feeder line application if the Board approves it. Transcript at 88-89 (Testimony of Terrence Hynes, counsel for CORP). The Port's feeder line application for that segment should be granted. The Port should be given every opportunity to make the Line profitable, and retention by CORP of a short segment that is more lucrative and allowed to control the entire line will only cause logistical problems and delays for shippers on the line. This would necessarily undermine the Port's good faith effort to open this Line to full service.

III. State, Shipper and Community Interests

The Board heard testimony at the August 21, 2008 public hearing regarding the devastating impact a loss of rail service would have on the shippers served by the Line and on the jobs and economic development in the rural areas impacted by the Line.

Governor Kulongoski testified in favor of the feeder line application and in opposition to abandonment. He testified that the Coos Bay Line is of great importance to Oregonians because of its role in the State's economy and especially this region's economy. He testified on the plight of American Bridge, for example, which has its West Coast headquarters on Bolton Island between Reedsport and Gardiner. The company has lost business opportunities due to the embargo because its large steel fabrications of bridges for highways and railroads can only be shipped by rail. Trucking is not an alternative for them. He also noted that Southport Lumber invested in a new facility on the old Weyerhaeuser site on the North Spit of Coos Bay because of the diverse transportation options, including rail. Its monthly transportation costs have soared since the shutdown. Service needs to be immediately restored to this area.

The Governor testified that his office and the Oregon Department of Transportation (ODOT) engaged in talks with RailAmerica in early October of 2007 to discuss their plan to fix the tunnels and reopen the Line. The Governor was told that a plan to reopen the Line was “forthcoming” and that the closure was “temporary.” Interim Transcript, August 21, 2008 Public Hearing (“Transcript”) at 10. Despite their assurances, RailAmerica “did not develop a plan to ensure the tunnels were reopened.” *Id.* Instead, RailAmerica announced at a press conference, without any formal negotiations with the affected parties, that they would need a public/ private partnership to proceed further with reopening the Line. RailAmerica announced this partnership required that the Port of Coos Bay, the shippers, the Union Pacific Railroad and the State of Oregon each contribute \$4.6 million dollars. *Id.* at 11. RailAmerica also asked that the State of Oregon to provide as much as \$16 million dollars over a five year period to defray the company's operating cost and make ongoing capital improvements to the Line. *Id.* RailAmerica further announced that it was not willing to take steps to reopen the Line without this investment of private and public dollars. *Id.* The Governor said that it would not be fair to allow RailAmerica to “neglect the line, hold communities for ransom for repair and if they don't pay up, then overprice it and sell it for scrap.” *Id.* “At some point providing [rail] infrastructure for rural America cannot just be a bottom line accounting decision, otherwise, small economic regions like the Southern Oregon Coast will become more isolated and economically unstable.” *Id.* The Governor testified in support of the Port's feeder line application, stating that regional businesses and communities believe that they are better able to make this Line operable, and asking the Board to establish a reasonable price for sale to the Port to allow continued operation of the Line. Transcript at 11.

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U.S. Representative Peter DeFazio testified in favor of the Port's feeder line application. Congressman DeFazio has been working with the Governor to try to find a solution to this issue. He was present at the meeting convened by the Governor with RailAmerica and other stakeholders. He criticized RailAmerica and CORP for failing to spend enough to maintain continued safe operation of the Line during its ownership, and for issuing an embargo with less than 24 hours notice to affected shippers, when CORP had long known of the deteriorated conditions that were used to justify the embargo. He previously obtained a substantial amount of federal funds for the Coos Bay Rail Bridge Rehabilitation project, to repair and replace track to maintain rail service for shippers south of the bridge, and sufficient to keep the bridge operating safely for the next decade, and that the federal funds were based on assumed continued rail service. Transcript at 17-19. He also testified that that federal and state funding have been made available to support the Port's feeder line application. *Id.*

State Representative Susan Morgan testified in favor of the feeder line application and in opposition to abandonment. She serves as chair of the South West Oregon Work Group for Economic Development, a partnership of public and private sector interests striving through transportation infrastructure investments to foster job creation and retention in the five counties of Southwest Oregon. She testified that for Coos, Douglas and Lane counties, the manufacturing sector relies on the Coos Bay Line to bring in raw materials and to ship finished goods to market in the most cost effective way. The success of these businesses depends upon putting products into national and international markets at competitive rates. Raising transportation costs diminishes their ability to competitively market their products. If the Coos Bay Line is not reopened, local jobs are at risk. Rep. Morgan testified that the Coos Bay Line is critical to Southern Oregon's economy, including thousands of jobs throughout the region. "When we consider the shippers on the line that are affected by this discussion, we are talking about 750 jobs," Rep. Morgan said "If we use the standard multiplier that three jobs will be created in the

service sector for each manufacturing job, we are considering the future of over 2,200 jobs. This is a significant portion of the jobs in that region, and it underlies the importance of operating the Coos Bay Line.” Transcript at 42-43.

Oregon State Senator Joanne Verger, representing parts of six counties on the Oregon Coast from Coos Bay to Lincoln City, testified in opposition to abandonment and in support of the Port’s feeder line application. She spent eight years as the Mayor of Coos Bay and eight years in the Oregon Legislature, and she has been working with the Port of Coos Bay since 1992. She testified that the State has made a substantial financial commitment to the Port of Coos Bay and to its future as a container port. The state of Oregon has committed to invest \$60 million as its share of the total investment required to get the Port ready for container vessels. In 2007, the Oregon legislature approved HB 5036, which provides up to \$60 million as a local match for the Coos Bay Channel Project to deepen the Coos Bay shipping channel to 55 feet. This will allow the Port to accommodate new generations of deep draft cargo vessels and to diversify the types of cargo that can be processed through the port, increasing maritime and international trade throughout Oregon, and improving the attractiveness of Oregon to new businesses and supporting the operations and prosperity of existing businesses. As the Port’s feeder line application indicates, the Port has executed an agreement with A.P. Moeller Maersk to investigate the North Spit industrial area as a potential site of a two million TEU container terminal. Sen. Verger and Rep. Morgan both testified that the state legislature undertook this substantial financial commitment in reliance on this rail line continuing to operate. Transcript at 60-61.

Representative Morgan also testified that, in addition to the State's \$60 million commitment to the Port's containment facility project, the legislature has also invested "\$10 million dollars in building a new terminal at the North Bend airport" and has made significant investments through several state programs in other industrial infrastructure in that region in reliance on the expectation of continued rail service to the area. Transcript at 61.

Various other state investments were based on the assumption of continued rail service on this Line. State, federal and local funds, including a loan from the State to the Port, were used to pay for the \$4 8 million 4 mile North Spit spur rail line construction in 2004-2005. *See* Port's Show Cause Reply at 20. This new rail line was built entirely with public money to give CORP access to revenue from new shippers, such as Southport Forest Products. *Id.* Southport's new facility and the Port's construction of the North Spit rail line were both completed in reliance on the existence of rail access and future rail service. *Id.*

Coos County Commissioner John Griffith testified at the public hearing that the area located along the new rail spur on the North Spit has been zoned for heavy industry since 1985, when Coos County's state mandated comprehensive plan was adopted by the Oregon State Land Conservation & Development Commission. The dedication of this area to industrial use is part of the County's long term state mandated comprehensive plan and was based on the assumption of continued access to rail service. Transcript at 84-86. The Port of Coos Bay has purchased 1300 acres of industrial land. Transcript at 130 (Testimony of Catherine McKeown, Commissioner, Port of Coos Bay). Absent rail service, this area will no longer be attractive for to potential industrial developers. Coos County is already suffering from the loss of federal in-lieu of timber payments, and its general fund is severely depleted as a result. A loss of rail dependant jobs in the local economy would be significant injury in a rural community where those jobs cannot be easily replaced by jobs in another sector.

Other public officials testified on the adverse impact on their communities if the Line were to be abandoned, and if timber, mining, gravel and other businesses in their communities were denied access to rail service. All testified in support of granting the Port's feeder line application. *See* Testimony at 72-97 (representing Lane County, Douglas County, City of Coos Bay, and City of Reedsport).

The State of Oregon has awarded sizable grants to CORP over the past 10 years to aid CORP with the Coos Bay Line. CORP received \$700,000 in grants from the Oregon Short Line Railroad Rail Infrastructure Improvement Program for replacement of ties and ballast on the Coos Bay Line: \$300,000 in 2003 and \$400,000 in 2005. Port's Show Cause Reply at 20; Exs. 17 and 18. In 2006, CORP was awarded \$7.7 million from the *ConnectOregon* program to build a new switching yard at Winchester to relieve pressure on the Roseburg rail yard. *Id.* Although this yard is on the Siskiyou Line, CORP's application provided justification for the funds by stating that the grant would also have benefited rail operations on the Coos Bay Line. *Id.* These funds were awarded to CORP by the state of Oregon with the assumption that rail service would continue on the Coos Bay Line.

Fred Jaquot, the plant manager for American Bridge, testified regarding the devastating effects the CORP's 2007 embargo has had on his plant and the long term impacts if the rail line is abandoned. American Bridge Company selected the current Reedsport plant location because it had an existing rail spur and immediate access to Class I rail infrastructure throughout the nation. American Bridge broke ground in 2002 and began operation in 2003. American Bridge Company has invested over \$16 million in the plant in reliance on the existence of rail service. They have sold over \$28 million dollars in railroad, highway and pedestrian bridges for projects through out the western and middle United States. They fabricate bridges and steelwork, including fabricating steel for the Hoover Dam bypass bridge and supporting structure for erection of the San Francisco Bay Bridge in San Francisco, California. They have an 80 person work force,

comprised of displaced timber, construction and shipyard workers from the local region, many of whom would have to leave the area have to find work if American Bridge were forced to close or relocate. The 2008 projected payroll is \$2.8 million. The estimated future rail use is 90 to 150 cars per year. The increased cost to American Bridge resulting from the embargo includes the increased cost of obtaining raw materials, and the increased cost to transport the finished product. In addition, the current loss of rail service has led to unsuccessful bidding for over \$18 million in new contracts during 2008 alone. If the Line is abandoned, the markets American Bridge successfully competed in before the embargo will be closed to them for good. Transcript, pages 174-178.

Other shippers on the Line testified regarding the impact if the Line is allowed to be abandoned. Their evidence weighs in favor of denial of abandonment. *See* testimony of Coos Siskiyou Shippers Coalition/Roseburg Forest Products, Southport Forest Products; Oregon Western Lumber; Menasha Forest Products; Plum Creek Timber, Georgia-Pacific Wood Products, Chambers Plumbing and Heating, and Danish Dairy. Transcript at 150-182.

The evidence in the record, including the testimony at the hearing, shows that abandonment of the Line will have serious, adverse impact on rural and community development in Oregon. CORP's application to abandon the Line should be denied until it restores the Line to a serviceable condition.

IV. Public Convenience and Necessity

Nearly all of the testimony at the public hearing was in favor of accepting the Port of Coos Bay's feeder line application to purchase the entire Line for a reasonable amount and to restore short line service to Oregon's south coast.

The evidence and argument, both submitted by the Port and others in its feeder line application, and the testimony at the August 21, 2008 public hearing, overwhelmingly support a finding that public convenience and necessity permit or require acquisition of the entire Coos Bay Line by the Port. *See* Port's Feeder Line

Application at 37-45. CORP has refused to provide ongoing service due to the embargo, and CORP's service was inadequate prior to the embargo. Many affected shippers submitted evidence in support of the Port's feeder line application, and testified at the public hearing, that CORP's service was inadequate, and that the Port's feeder line application to purchase the Line should be approved. Transcript at 150-182

The State believes that the Port is uniquely situated to purchase the Line for the express purpose of restoring and improving rail service to the south coast region. The Port serves as an engine of regional economic development and an advocate for investment in infrastructure. Over the past several years, the Port has demonstrated its bona fides in this regard and has achieved considerable success in securing needed public funding for infrastructure for the benefit of the Port, the City of Coos Bay, CORP and the surrounding region. At the same time, the Port itself will benefit from restoring and improving rail service, which will attract new business at the Port and preserve existing opportunities for expansion. Because of these twin interests, the Port's ownership of the Line will garner immediate credibility and restore public faith—which CORP and RailAmerica squandered and then consciously spurned. In stark contrast to Fortress Investment Group, CORP's and RailAmerica's hedge-fund parent, the Port views its ownership of the Line as an investment for the communities and businesses along Oregon's south coast, rather than a mere financial investment that can be liquidated due to insufficient revenue. Accordingly, the State strongly supports the feeder line application filed by the Port.

V. The Line Should be Restored to Serviceable Condition

The most significant issue before the Board in these proceedings is whether CORP can and should be required to restore the Line to serviceable condition for the Port, as the subsequent purchaser, and what a reasonable price of purchase would be.

In Docket 35130, the State, the Port and the shippers contend that CORP's embargo was an unlawful abandonment. The embargo was unreasonable from its

inception, and in violation of CORP's common carrier obligation, because the unsafe conditions in tunnels 13, 15 and 18 were caused by the railroad's neglect, not by any act outside of the railroad's control. See State of Oregon's Show Cause Reply at 1-15. While a cessation of operations caused by factors beyond a railroad's control does not give rise to an abandonment, "[a]n abandonment should not be deemed beyond the control of the railroad if the unsafe track condition conditions that required cession of services were caused by neglect of the railroad to properly maintain its rail line." *ICC v. Chicago and North Western Transportation Company, et al*, 407 F. Supp. 827, 830-31 (S.D. Iowa 1974), *aff'd*, 533 F.2d 1025 (8th Cir. 1976). That is what happened here. Because the railroad was aware of the deteriorated and unsafe conditions long before the embargo, and it failed to repair the Line to a safe operating condition, its decision to cease services on the Line is properly classified as an unlawful abandonment.

The railroad was informed of the deteriorated condition of the tunnels that was used to justify the embargo as early as 1994 in a Shannon and Wilson report and again in 2004 in a report by Milbor Pita. See Port's Show Cause Reply at 11-18; and Port's Show Cause Reply, Vol. II, Exs. 17-18.

Nor is the continuing embargo of the Line reasonable. While the railroad has claimed its delay in making repairs to tunnels 13, 15, and 18 is due to "wet weather," the railroad has never intended to repair the Line. The railroad has submitted to the Board no engineering plan, pre-construction materials or drawings that would be the necessary precursors to actually reconstructing the tunnels. CORP represented to Governor Kulongoski that such a repair plan "would be forthcoming," but no such plan was ever provided. Transcript at 10; *see also* State's Show Cause Reply at 15-30. Under these circumstances, the Board should not allow CORP/RailAmerica to use their failure to timely address the conditions in tunnels 13, 15, and 18 as an excuse to embargo the Line and as a mechanism to escape their common carrier obligation to provide rail service. The Board should order that an escrow account be established and that CORP pay into

that account the costs to restore the Line into serviceable condition as a result of CORP's unlawful abandonment.

The record shows that substantial expenditures have been made by the Port, the State of Oregon and shippers and other businesses in good faith and reliance on CORP's representation that rail service on the Line would continue. As such, any revenue earned by CORP over the last six or more years was made possible by the funding of others. It is only fair and equitable for the Board to attach a condition to these proceedings that these investment funds be re-paid by CORP. *See, e.g., Central Michigan Railway Company – Abandonment Exemption – In Saginaw County, MI*, Docket AB-308 (Sub-No. 3X), slip op. at 6-7 (served Oct 31, 2003) (where shipper made a “good faith investment” and “had no basis for thinking that its investment would be lost shortly after it was made,” Board orders abandoning railroad to reimburse shipper \$100,710 (less salvage value) for cost of installing rail trackage and unloading facilities built in 1996-1998).

The courts have traditionally described this issue “as one of equity, whether it would be equitable to require substantial expenditures [by the railroad] when shortly thereafter the Commission may approve the railroad’s abandonment application.” *Interstate Commerce Com. v. Chicago, R. I. & P R Co.*, 501 F.2d 908, 915 (8th Cir. 1974) In the Eighth Circuit, the Commission took the position that “no [ICC] case has allowed ‘abandonment by neglect,’ *i.e.*, permitting a railway by a deliberate neglect of essential maintenance which allows tracks to deteriorate to a ‘deplorable condition’ to then successfully argue that restoration of service would be inequitably expensive.” *Id.*, 501 F.2d at 915. In such a case, the Commission argued, “the equities of the situation significantly favor the shippers on the line,” and would require the railroad to restore services. *Id.* That is the case here.

Likewise, even if the Board were to somehow not find there has been an unlawful abandonment by neglect, the Board has the equitable authority to require CORP to pay

the cost to restore the Line to a serviceable condition as part of the feeder line process.

“It is well settled that administrative agencies have inherent authority to protect the integrity of the regulatory processes that they are charged with administering, and to prevent or remedy a misuse of those processes.” *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, Docket AB-556 (Sub-No. 2X), slip op. at 12 (served October 4, 2000) (“*Railroad Ventures*”); see also Port’s Feeder Line Application at 52-53. Regulatory agencies are “afforded some discretion in determining which sanctions or remedies would best effectuate statutory objectives.” *Zola v. Interstate Commerce Commission*, 889 F.2d 508, 515 (3rd Cir. 1989).

The statutory objectives of the feeder line procedure are “to provide shipper groups and government agencies an alternative to inadequate rail service and to preserve feeder lines prior to the total downgrading of such lines” See House Conference Report No. 96-1430 at page 124, reprinted in 1980 U.S.C.C.A.N. 4110, 4156 (emphasis added). It would subvert the purpose of the feeder line process, and chill potential future feeder line applications, to permit a railroad to allow a line to go into total ruin before a feeder line application comes in.

The Board could order an escrow of funds as a condition of denying the abandonment and granting the feeder line applications. The State has been, and continues to be, ready and willing to support this Line, so long as CORP proceeds with making the repairs needed to bring it back to operating levels. Transcript at 19-20. The escrow funds would be used by the Port for the purpose of paying for repairs that are needed to restore the Line to serviceable condition. See e.g., *Railroad Ventures*, Docket AB-556 (Sub-No. 2X) slip op. at 19 (served October 4, 2000) (Board orders creation of escrow account so that selling railroad pays for crossing and signal repairs after OFA sale). The Sixth Circuit affirmed the Board’s action. *Railroad Ventures, Inc. v. Surface Transportation Board*, 299 F.3d 523, 559-560 (6th Cir. 2002). See also *Kansas City*

Southern Railway Company – Abandonment Exemption – Line in Warren County, MS,
Docket AB-103 (Sub-No. 21X), slip op. at 4-5 (served May 20, 2008) (Board orders
abandoning railroad to pay for bridge damage caused by neglect during OFA process);
Port Feeder Line Application at 48-54.

An order by the Board to require CORP to return the Line to a serviceable
condition or compensate for the Line's repair would rectify years of neglect and deferred
maintenance by CORP, and also protect the integrity of the Board's abandonment,
embargo and feeder line procedures, by ensuring that the Port and the public are able to
preserve this feeder line that is a vital part of the national transportation infrastructure to
this region.

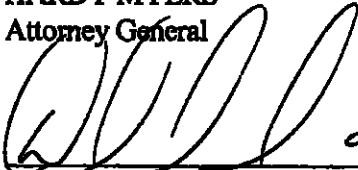
VI. Conclusion

CORP's application to abandon should be denied and CORP should be required to
pay into escrow the funds necessary to restore the Line to a serviceable condition. The
Port's feeder line application should be granted.

DATED this 28 day of August, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the COMMENTS OF THE STATE OF OREGON in STB Finance Docket No. 35160 (Feeder Line Application) and Docket No. AB-515 (Sub-2) (Abandonment and Discontinuance of Service) to be served by email and/or first-class mail this 28th day of August, 2008 on the following:

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